

S.B., Appellant

**U.S. POSTAL SERVICE, VISTA STATION
POST OFFICE, Sparks, NV, Employer**

Appearances:

Lisa Varughese, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

Before:

JURISDICTION

On June 8, 2020 appellant, through counsel, filed a timely appeal from a February 4, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$24,081.41, for which she was without fault, because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period September 1, 2016 through November 9, 2019, without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$679.25 from her continuing compensation payments every 28 days.

FACTUAL HISTORY

On November 1, 2002 appellant, then a 52-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on September 25, 2002 she sustained an injury to her upper right leg and hip joint when computers shifted on a hand truck, causing her to fall backward into a shelf. Her retirement coverage was noted on the claim form as Federal Employees Retirement System (FERS). OWCP accepted the claim for lumbar sprain, displacement of lumbar intervertebral disc without myelopathy, degeneration of lumbar or lumbosacral intervertebral disc, and spinal stenosis lumbar region. On November 16, 2005 appellant underwent a lumbar spine fusion and laminectomy. She stopped work on November 16, 2005. OWCP paid appellant wage-loss compensation on the supplemental rolls effective November 16, 2005, and on the periodic rolls effective April 15, 2007. By decision dated November 27, 2007, it reduced her compensation based on her capacity to earn wages in the constructed position of cashier.

On October 9, 2019 OWCP forwarded a FERS/SSA benefits calculation transmittal form to the SSA to obtain information necessary for a determination of whether an offset of compensation benefits was required.

On October 28, 2019 OWCP received from SSA an October 16, 2019 FERS/SSA dual benefits calculation which established that appellant had been in receipt of SSA age-related retirement benefits since September 2016. The form showed appellant's SSA benefit rates with and without a FERS offset. Beginning September 2016, the SSA rate with FERS was \$1,217.20 and without FERS was \$604.50; beginning December 2016, the SSA rate with FERS was \$1,220.80 and without FERS was \$606.30; beginning December 2017, the SSA rate with FERS was \$1,245.20 and without FERS was \$618.40; and beginning December 2018, the SSA rate with FERS was \$1,280.00 and without FERS was \$635.70.

OWCP completed a FERS offset calculation worksheet on November 19, 2019. It calculated the overpayment amount by determining the daily FERS offset amount and multiplying that amount by the number of days in each period from September 1, 2016 through November 9, 2019, resulting in an overpayment of \$24,081.41. The form indicated that, from September 1 through November 30, 2016, appellant received an overpayment in the amount of \$1,838.10; from December 1, 2016 through November 30, 2017, she received an overpayment in the amount of \$7,394.26; from December 1, 2017 through November 30, 2018, she received an overpayment in the amount of \$7,542.26; and from December 1, 2018 through November 9, 2019, she received an overpayment in the amount of \$7,306.79.

In a November 19, 2019 letter, OWCP informed appellant that it would begin deducting the portion of SSA age-related retirement benefits attributable to her federal service from her 28-

day periodic compensation benefits. It noted that her gross FECA compensation benefit of \$2,717.00, every 28 days, would be offset by \$594.74, which was her monthly \$644.30 SSA benefit attributable to federal service adjusted to a 28-day amount of \$594.74. OWCP further explained that, after appellant's health insurance deduction of \$513.08, her net compensation benefit every 28 days would be \$1,609.18.

On December 16, 2019 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$24,081.41 had been created because it had failed to reduce appellant's wage-loss compensation payments for the period September 1, 2016 through November 9, 2019 to offset her SSA age-related retirement benefits that were attributable to federal service. It also determined that she was without fault in the creation of the overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable repayment method and advised her that she could request waiver of recovery of the overpayment. It further requested that she provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

On December 20, 2019 OWCP received the first page of appellant's overpayment action request form. Appellant requested waiver and argued that she was without fault in the creation of the overpayment. She noted that, every year after she received the form, she spoke with OWCP and SSA to determine her SSA benefit and responded according to the information she was provided. No additional evidence was received.

By decision dated February 4, 2020, OWCP finalized the December 16, 2019 preliminary overpayment determination. It found that appellant had received an overpayment of compensation in the amount of \$24,081.41. OWCP further found that she was not at fault in the creation of the overpayment, but denied waiver of recovery of the overpayment due to the lack of financial information/documentation. It required recovery by deducting \$679.25 every 28 days from appellant's continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of his or her federal employment.⁴ Section 8116 limits the right of an employee to receive compensation: While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁵ When an overpayment of compensation has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁶

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ *Id.* at § 8129(a).

Section 10.421(d) of FECA implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA age-related retirement benefits that are attributable to federal service of the employee.⁷ FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA age-related retirement benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$24,081.41, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period September 1, 2016 through November 9, 2019, without an appropriate offset.⁹

The evidence of record indicates that, while appellant was receiving wage-loss compensation benefits under FECA, she also was receiving SSA age-related retirement benefits based upon her federal service. A claimant cannot receive both compensation for wage-loss compensation benefits under FECA and SSA age-related retirement benefits attributable to federal service for the same period.¹⁰ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service during the period September 1, 2016 through November 9, 2019. Consequently, the fact of overpayment has been established.

To determine the amount of the overpayment, the portion of SSA age-related retirement benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific rates of SSA age-related retirement benefits that were attributable to federal service. SSA provided its rate with FERS and without FERS for specific periods from September 1, 2016 through November 9, 2019. OWCP provided its calculations for each relevant period based on the SSA worksheet and determined that appellant received an overpayment in the amount of \$24,081.41.

The Board thus finds that appellant received prohibited dual benefits for the period September 1, 2016 through November 9, 2019, totaling \$24,081.41.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹¹ Thus, a finding that appellant was without fault does not automatically result in waiver of the

⁷ 20 C.F.R. § 10.421(d); *see T.B.*, Docket No. 18-1449 (issued March 19, 2019); *L.J.*, 59 ECAB 264 (2007).

⁸ FECA Bulletin No. 97-09 (issued February 3, 1997).

⁹ *P.B.*, Docket No. 20-0862 (issued November 25, 2020); *R.C.*, Docket No. 19-0845 (issued February 3, 2020); *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

¹⁰ 20 C.F.R. § 10.421(d); *see T.B.*, *supra* note 7; *L.J.*, *supra* note 7.

¹¹ 5 U.S.C. § 8129(a)(b).

overpayment. OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹²

Section 10.437 of OWCP's implementing regulations provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹³

Section 10.438 of the implementing regulations provides that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery on an overpayment would defeat the purpose of FECA or be against equity and good conscience. The information is also used to determine the repayment schedule, if necessary.¹⁴ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁶ Appellant, however, had the responsibility to provide the appropriate financial information to OWCP.¹⁷

In its preliminary overpayment determination dated December 16, 2019, OWCP requested that appellant submit a completed overpayment questionnaire with supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It advised him that it would deny waiver of recovery if she failed to furnish the requested financial information within 30 days. Appellant, however, did not submit a completed Form OWCP-20 or submit the supporting financial documentation necessary for OWCP to determine whether recovery of the overpayment would defeat the purpose of FECA or whether recovery would be against equity and good conscience.

As appellant did not submit the information required under section 10.438 of OWCP's regulations, which was necessary to determine her eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment.¹⁸

¹² *L.S.*, 59 ECAB 350 (2008).

¹³ 20 C.F.R. § 10.437; *see E.H.*, Docket No. 18-1009 (issued January 29, 2019).

¹⁴ 20 C.F.R. at § 10.438(a).

¹⁵ *Id.* at § 10.438.

¹⁶ *Id.* at § 10.436.

¹⁷ *Supra* note 15.

¹⁸ *D.C.*, Docket No. 19-0118 (issued January 15, 2020); *see S.B.*, Docket No. 16-1795 (issued March 2, 2017).

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.¹⁹

Section 10.441(a) of OWCP's regulations²⁰ provides in pertinent part:

"When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship."²¹

ANALYSIS -- ISSUE 3

The Board finds that OWCP improperly required recovery of the overpayment by deducting \$679.25 from appellant's continuing compensation payment every 28 days.

The record reflects that appellant continues to receive wage-loss compensation under FECA. As noted, she did not provide the information necessary for OWCP to consider the amount to be withheld from her continuing compensation. When, as in this case, no response is received to the preliminary overpayment determination, OWCP's procedures require that the rate of repayment be set at 25 percent of the 28-day net compensation amount.²²

In a letter dated November 19, 2019, OWCP indicated that appellant's gross compensation was \$2,717.00 and her net compensation (after deductions for health insurance and FERS offset) was \$1,609.18. In the final overpayment determination dated February 4, 2020, it indicated that it would recover the overpayment by deduction of \$679.25 every 28 days from her continuing compensation benefits. However, the amount of \$679.25 represents 25 percent of appellant's gross compensation of \$2,717.00, and not 25 percent of her net compensation of \$1,609.18. The Board finds that 25 percent of \$1,609.18 of her net compensation benefit is \$402.30. On remand, OWCP shall revise the amount of recovery to reflect that \$402.30 should be withheld from appellant's continuing compensation benefits every 28 days.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$24,081.41, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for

¹⁹ 20 C.F.R. § 10.441; *see M.P.*, Docket No. 18-0902 (issued October 16, 2018).

²⁰ *Id.* at § 10.441(a).

²¹ *Id.*; *see C.M.*, Docket No. 19-1451 (issued March 4, 2020).

²² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment ions*, Chapter 6.500.8(c)(1) (September 2018).

the period September 1, 2016 through November 9, 2019, without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment. Additionally, the Board finds that OWCP improperly required recovery of the overpayment by deducting \$679.25 from appellant's continuing compensation payments every 28 days. As such, OWCP shall recover the overpayment by deducting \$420.30 from her continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the February 4, 2020 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: April 8, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board